



Potential Options for the National Security Personnel System

Labor Management Relations & Employee Appeals

Presented to:
Department of Defense Unions

August 16, 2004
(revised September 1, 2004*)

On June 29, 2004, DoD and OPM leaders met with DoD union leaders to continue discussions on the design and implementation of the National Security Personnel System (NSPS). During that session, DoD and OPM agreed to provide the unions with potential options for NSPS by late August and to organize another meeting to discuss those options. The attached options were developed by the Program Executive Office, NSPS (PEO-NSPS) Working Groups as potential features of the National Security Personnel System Labor Management Relations System and Employee Appeals System. These are working ideas and concepts that have not been approved or endorsed by DoD leadership. The purpose of presenting these options is to generate discussion, and obtain the union's feedback and input into the NSPS design.

These options do not constitute a proposal, and are “predecisional.”

*This document has been revised from the August 16 version to address questions raised by DoD unions during the August 25-26, 2004, consultation sessions.

Draft Options for the National Security Personnel System Labor Management Relations & Employee Appeals

Ability to act without delay

- Scope of Bargaining
- Length of Bargaining
- Furnishing of Information

Ability to implement DoD and Component-wide policies quickly and consistently

- Local Bargaining on Agency Issuances
- National Level Bargaining
- Multi-unit Bargaining
- National Consultation

Ability to quickly resolve labor disputes

- Dispute Resolution and Third Party Review

Open Management-Employee Communications

- Employee-Management Communications

Ability to handle quickly and decisively, performance deficiencies and egregious misconduct; and

Ability to have a system of appeals that is simple and streamlined

- Consideration of DoD Mission in Appeals Adjudication
- Independent Review
- Expedited Case Processing & Appeal Resolution
- Standard of Evidence and Legal Authorities

Guiding Principles

Potential design options described in this paper have been crafted based on seven “guiding principles” that act as guideposts as we explore options. All NSPS design features will be rooted in one or more of these guiding principles. The Department’s senior leadership endorses these guiding principles. NSPS must:

- Put mission first - support national security goals and strategic objectives
- Respect the individual; protect rights guaranteed by law
- Value talent, performance, leadership and commitment to public service
- Be flexible, understandable, credible, responsive, executable
- Ensure accountability at all levels
- Balance human resources interoperability with unique mission requirements
- Be competitive and cost effective

Key Interest – Ability to act without delay

The Department needs to have the ability to act without delay in support of our evolving and dynamic national security mission; this includes taking timely action in non-emergency situations.

Key Concerns

- Although the Department has the right to take certain actions under current law, management must bargain over their impact and implementation before affecting them. These negotiations are often protracted and involve third party intervention with little or no incentive to resolve issues or to do so quickly.
- Disproportionate time and effort is too often spent on matters with minimal impact.
- The current statute is silent on DoD's national security mission.
- The inability to act without delay prevents mission-driven changes from being implemented and diverts resources from mission areas.
- Standards for information requests do not recognize technology advancements and create an administrative burden. Further, the bargaining process may be delayed by the requirement to respond to overly broad information requests.

Issues

Scope of Bargaining

How It Works Under the Current System

- Management's reserved and permissive rights are identified in Title 5.
- Requires bargaining over impact and implementation of the exercise of management's rights.
- Must bargain over changes to conditions of employment.
- Bargaining obligation arises when change to conditions of employment is anything greater than *de minimis*.
- Normally cannot implement change until bargaining obligation is completed, this can take months to accomplish.

Potential Design Options

- Convert permissive rights to reserved rights.
- Bargain only where change has significant impact on unit employees.
- Management can act immediately - for cause - with post implementation bargaining applied retroactively, to the extent possible. (Union notice of change given as far in advance as possible.)

- Management can act immediately - for cause - with post implementation bargaining applied prospectively. (Union notice of change given as far in advance as possible.)
- Impact and implementation (I&I) bargaining over only certain management rights.
- Post implementation I&I bargaining over all management rights.

Length of Bargaining

How It Works Under the Current System

- Normally management must complete the bargaining process prior to implementing any changes to conditions of employment.
- There is no statutory time limit on the negotiations.
- The duty to maintain the status quo during bargaining over implementation of changes in conditions of employment also applies to those changes directed by DoD, OPM or other Federal regulatory agencies.
- Negotiations can take from months to years to complete.
- Where agreement cannot be reached the Federal Service Impasses Panel can dictate contract language.

Potential Design Options

- Establish time limits on I&I and full term contract negotiations.
- Establish time limits for I&I bargaining but not full term contract negotiations.
- Establish time limits with prospective post implementation bargaining.
- Establish time limits with retroactive post implementation bargaining, where possible.

Furnishing of Information

How It Works Under the Current System

- Union entitled to information, upon request, which is “reasonably available” and necessary for representation of the bargaining unit - unions must demonstrate a “particularized need” for the information.
- Cannot release information prohibited by law.
- Request for information can be burdensome.
- Information must be provided even if available through other sources.
- The bargaining process can be delayed because of information requests.
- Information may be releasable without regard to impacted employee concerns.

Potential Design Options

- Provide necessary information not available through other sources.
- Ensure employee privacy.
- Define what is meant by “reasonably available”.
- Clarify “particularized need” ensuring unions receive relevant and necessary information.
- Develop process to quickly resolve information request disputes.

Key Interest – Ability to implement DoD and Component-wide policies quickly and consistently

The Department must be able to implement DoD and Component-wide policies and programs in a consistent and timely manner, including personnel and other policies that affect conditions of all DoD civilians.

Key Concerns

- Current DoD policies are subject to modification through the bargaining process at every one of the Department’s over 1,500 command and local bargaining units.
- The process is costly and time-consuming and results in inconsistent application of critical policies and an inability to implement those policies simultaneously across the Department.
- The current system often involves slow and complex third party dispute resolution procedures in areas such as negotiability and impasse, further delaying needed changes.

Issues

Local Bargaining on Agency Issuances

How It Works Under the Current System

- The terms of the collective bargaining agreement establish working conditions for employees in bargaining units.
- The bargaining agreement supercedes agency regulations and subsequently issued agency or government-wide regulation where the terms conflict with the agreement.
- DoD/component issuances not necessarily a bar to local negotiations.
- Inconsistent application of DoD/Component issuances based on local negotiations.

- Title 5 provides that the union is entitled to official time for negotiations and for attending proceedings before the Authority.
- Official time for union representational duties is negotiable.
- No official time for internal union business.

Potential Design Options

- Eliminate obligation to bargain over DoD and Component issuances.
- Immediate implementation of DoD/Component issuances with subsequent local bargaining as authorized by the issuance or the Secretary of Defense or Component Head concerned.
- Prospectively bargain over procedures for implementation of DoD or Component issuances.
- National level (DoD/Component) consultation over regulation prior to issuance.

National Level Bargaining

How It Works Under the Current System

- Bargaining over conditions of employment occurs at the level of recognition, typically at the installation level.
- Unions holding national consultation rights are consulted on Department and Component-wide policies before issuance (currently there are nine DoD unions with national consultation rights.)
- Installations must bargain implementation procedures locally before policy can be effected.
- There are no provisions for bargaining above the level of recognition, i.e., at the national level.

Potential Design Options

- Bargain with only those unions impacted by change.
- Single agreement covers all unions.
- Collaborative issue-based national level bargaining at DoD or Component level.
- Bargaining impasses subject to binding third party decision.
- Time limit on national level bargaining.
- Electronic/telephonic negotiations authorized.
- Agreement applies to all employees covered by unions invited to negotiations.
- Unions elect bargaining team or representatives for national level bargaining, to make it manageable.
- Address official time (and travel and per diem) for national level bargaining.
- Identify specific reasons for authorizing official time.
- Require reporting of official time using OPM standards.
- Require consistent approval/reporting process for granting official time.

Multi-unit Bargaining

How It Works Under the Current System

- The current system permits but does not require multi-unit bargaining.
- Difficult to reach uniform local policies based on multiple individual bargaining agreements.
- Factors for determining bargaining units are community of interest, effective dealings with and efficiency of the agency's operations.
- Certain exclusions from bargaining unit coverage are identified in Title 5, e.g., supervisors, management officials, confidential employees, personnelists, intelligence work and investigators involved in internal security.

Potential Design Options

- Issue-driven joint negotiations cover all employees on an installation.
- Collaborative issue-based joint negotiations covering all employees within an organization/command.
- Joint negotiations for all units with mission-specific supplementation.
- Negotiations subject to impasse.
- Multi-unit bargaining subject to management sole and exclusive approval.
- Require consideration of DoD mission/organizational structure in determining appropriate units.
- Establish additional exclusions from bargaining unit (e.g., supervisors of military.)

National Consultation

How It Works Under the Current System

- Prior to issuance of DoD/Component policy, national unions provided opportunity to comment.
- Comments must be considered in development of policy.
- Specific criteria established for obtaining national consultation rights – based on size.

Potential Design Options

- Eliminate national consultation.
- Conduct national consultation without status quo remedies.
- No national consultation on regulations negotiated at national level.
- Establish new criteria for granting of national consultation rights.
- Furnish issued regulations electronically to all national unions.

Key Interest – Ability to quickly resolve labor disputes

The Department needs a streamlined, fast, credible dispute resolution system.

Key Concerns

- Parties are faced with multiple, confusing options when seeking resolution of disputes. Similarly situated employees can elect different venues resulting in inconsistent results for the same set of facts.
- The current system also allows for confusing and complicated third party processes, including requests for readily available information, that fail to resolve issues quickly (often taking years), resulting in inconsistent decisions that requires re-litigation, and frustrate healthy labor management relations. This leads to parties pursuing multiple avenues to get favorable decisions.
- Current third party agencies (Federal Labor Relations Board, Merit Systems Protection Board, Federal Services Impasses Panel) have no obligation to consider the Department's national security mission when adjudicating disputes.

Issues

Dispute Resolution and Third Party Review

How It Works Under the Current System

- Numerous third-parties involved in labor dispute resolution.
- Multiple confusing options for employee appeals allow for similarly situated employees to avail different venues with different results.
- Third parties need not consider DoD's national security mission when adjudicating disputes
- Third party disputes can take years to resolve.

Potential Design Options

- Establish a third party to exclusively review DoD cases.
- Current third parties apply DoD-specific standards and issue decisions within specified time periods.
- Labor relations decisions must consider DoD's mission.
- DoD mission primary consideration in all labor relations decisions.
- Submit disputes to appropriate/single avenue for review (eliminate confusing options.)
- Maintain grievance arbitration but identify exclusions from grievance procedure.

Key Interest – Open Management –Employee Communication

Management must be able to communicate with its workforce in an open and frank manner, while recognizing the status of exclusive representatives.

Key Concerns

- Under the current system, managers are often uncertain as to when union attendance is required, which inhibits effective communication with employees (because of fear of unfair labor practice charges).
- Some unions exercise the entitlement to be present at a discussion, regardless of employee desires, which can impede resolution of individual concerns, including alternative dispute resolution efforts.
- Investigation of complaints, internal controls, suspected criminal activity, fraud, waste or abuse by entities such as the inspector general, auditors, and law enforcement agencies, is hampered by the requirement to permit union participation in the investigations.

Issue

Employee-Management Communications

How It Works Under the Current System

- Unions must be invited to formal discussions, i.e., discussions between management and employees over general conditions of employment and grievances, including formal EEO complaints.
- Unions can attend formal discussions or grievances and formal EEO complaint meetings even if objected to by the employees.
- The union is the exclusive representative -- management may not negotiate directly with employees.
- Employees may ask for union representation when questioned by management if they believe discipline could result (aka, Weingarten Right). This right applies to questions by the IG, criminal investigative agencies, etc.

Potential Design Options

- Management communicates directly with employees while retaining concept of union bypass (No direct negotiations with employees.)
- Redefine what constitutes a formal discussion, e.g., staff meeting, etc.
- Statutory appeals are not grievances for purposes of formal discussions.

- Ensure investigations can be administered efficiently and securely.
- Consider affected employees input in determining union involvement in discussions of personal nature.
- Establish time limits for obtaining union representation in Weingarten situations.

Key Interests:

Ability to handle quickly and decisively, performance deficiencies and egregious misconduct

Ability to have a system of appeals that is simple and streamlined

The Department needs an appeals system that is credible, fast, and recognizes DoD's national security mission.¹

Key Concerns

- The current appellate system is complex, legalistic and often too slow. Moreover, it fails to obligate third party agencies to adequately consider or give deference to the Department's mission requirements when considering whether to reduce or overturn discipline of employees.
- The current system often requires management to keep employees on the payroll while appeals of their case are pending.
- Complex and burdensome processes inhibit management from taking appropriate disciplinary actions.
- The current system requires employees to choose from a variety of forums, e.g., Merit Systems Protection Board, negotiated grievance procedure, administrative grievance procedure, for the same issue, resulting in confusion, inefficiency and lack of confidence in the process.
- The availability of multiple venues can result in identical cases being raised by different employees in multiple forums and which produce inconsistent decisions, creating disparate results for managers and employees.
- Procedures can be lengthy, particularly where the complaint also includes an allegation of discrimination, taking months or even years for final resolution.
- The complexity of the system deters managers from initiating needed and appropriate action, undermining public confidence in the ability of the Department to deal effectively with employee misconduct and poor performance.

¹ By law, provisions which are related to the National Security Personnel System appellate procedures shall ensure that employees covered by the NSPS are afforded fair treatment and the protections of due process. This footnote is included in response to questions raised by DoD unions during the August 26, 2004, consultation discussions.

Issues

Consideration of DoD Mission in Appeals Adjudication

How It Works Under the Current System

- System design addresses needs of employees in all federal agencies without regard to national security mission of the DoD.
- Other than security clearances, none of DoD's special national security programs are considered.
- Complex and lengthy process diverts critical resources away from mission priorities.
- No provision for Mandatory Removal Offenses.

Potential Design Options

- Establish DoD specific standards that obligate adjudicating authorities to take into account the DoD mission in rendering decisions.
- Establish the authority for Mandatory Removal Offenses.²

Independent Review

How It Works Under the Current System

- System design addresses needs of employees in all federal agencies without regard to national security mission of the DoD.
- Rulings of regional MSPB administrative judges are not always uniform when factual issues are similar in nature.
- System contains multiple authorities and levels of review, complex and lengthy procedures.

Potential Design Options

- Establish an independent DoD review authority to adjudicate DoD cases.
- Retain MSPB as an appeals adjudication authority using DoD regulations.
- Develop an integrated MSPB and DoD Board appeals process.
- Establish procedural/processing time limits and DoD specific standards for third parties to apply.

²By law, provisions which are related to the National Security Personnel System appellate procedures shall ensure that employees covered by the NSPS are afforded fair treatment and the protections of due process. This footnote is included in response to questions raised by DoD unions during the August 26, 2004, consultation discussions.

Expedited Case Processing & Appeal Resolution³

How It Works Under the Current System

- Pre-decisional process provides 30 days notification and 7day reply timeframes.
- Post-decisional process provides 30 days to file the appeal.
- MSPB uses many procedures associated with criminal and civil trials resulting in lengthy discovery and unnecessary hearings.
- The employee currently has 35 days to petition for review to the full Board.
- The full Board has no time limit to render its decision.
- Interim relief may be granted at any stage of the process.

Potential Design Options

- Establish required time limits and DoD specific standards for third parties to apply.
- Recognize and encourage the use of Alternative Dispute Resolution in joint regulations.
- Establish expedited procedures for pre and post-decisional case processing.
- Restrict interim relief authority to the full Board level.
- Allow the adjudicating authority to grant interim relief.

Standard of Evidence and Legal Authorities

How It Works Under the Current System

- Two legal authorities: 5 USC Chapter 43 (performance) and 5 USC Chapter 75 (conduct and/or performance).
- Two standards of evidence: preponderance (Chapter 75) and substantial (Chapter 43).
- Chapter 75 actions must promote the efficiency of the service.

Potential Design Options

- Develop a consolidated and streamlined legal authority for addressing employee conduct and performance issues that ensures due process.
- Replace the two standards of evidence with a single standard of evidence for all type of actions.

³ By law, provisions which are related to the National Security Personnel System appellate procedures shall ensure that employees covered by the NSPS are afforded fair treatment and the protections of due process. This footnote is included in response to questions raised by DoD unions during the August 26, 2004, consultation discussions.

- Retain two separate legal authorities for taking action.
- Change efficiency of the service as the standard for cause of action.